110-157

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 958.

E. J. HART, PLAINTIFF IN ERROR,

vs.

MARION SANSOM, J. C. LEAGUE, E. Y. LEAGUE, E. A. WELLS, AND C. G. WELLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED SEPTEMBER 18, 1883.

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1 December term, A. D. 1882. Monday, December 4th, 1882.

Be it remembered that there was opened and begun to be holden a regular term of the United States circuit court for the fifth circuit and northern district of Texas, at the city of Dallas, in Dallas county and said circuit and district, on the 4th day of December, A. D. 1882, it being the first Monday in said month in said year, and the day fixed by law for commencing a regular term of said court at said place. Present and presiding, the Honorable Andrew P. McCormick, United States district judge for the northern district of Texas, J. C. Bigger, United States attorney for said district, J. A. McKee, United States marshal for said district, and A. J. Houston, clerk of said court, when and where the following proceedings were had, to wit:

In Circuit Court United States, for Northern District Texas, at Dallas, June Term, 1881.

E. J. HART
vs.
MARION SANSOM, J. C. LEAGUE, E. Y. LEAGUE, E. A. WELLS, C. J. WELLS. } No. 141.

And now comes the plaintiff in this cause by his attorneys and leave of the court for that purpose, being first had and obtained, files this his first amended original petition as a substitute for and in lieu of his original petition filed in this court in this case
2 on the 31st day of January, A. D. 1881, to wit:

To the Judges of the Circuit Court of the United States for the Northern District of Texas, at Dallas:

The petition of Edmond J. Hart who is a citizen of the State of Lousiana, residing in the city of New Orleans, in said State, complaining of Marion Sansom, who is a citizen of the State of Texas, residing in the county of Johnson, in said State of Texas, and of J. C. League, E. Y. League, E. A. Wells, and her husband C. G. Wells, all of whom are citizens of the State of Texas, residing in the county of Galveston in said State, respectfully represents that on, to wit, the first day of February, in the year of our Lord one thousand eight hundred and seventy-nine, plaintiff was seized and possessed of the tract of land hereinafter described, holding and owning the same by fee-simple title, and that on the day last named defendants forcibly broke and entered the close of your petitioner and against his consent expelled him from said tract of land, and from thence until now have kept him so expelled and still so keep him expelled and dispossessed, to his damage fifty thousand dollars.

That defendants have during the time of their unlawful occupancy of said land, as aforesaid, cut down and removed from said land, or otherwise destroyed, ten thousand trees growing thereon of the value of two dollars each.

3 That during said occupancy by defendants, they have taken

and appropriated to their own use the rents, revenues, and profits of said land, which have been and now are of the annual value of three thousand dollars.

Plaintiff alleges that the tract of land herein sued for is the same tract sued for in his said original petition filed in this court and in this case on the 31st day of January, A. D. 1881, but the quantity or size of said tract was inadvertently described in said original petition as one league of land, whereas it was and is in truth a tract of six hundred and forty acres, and it is now here more particularly and accurately described as being a tract of land containing six hundred and forty acres lying in Johnson county, in the State of Texas, and known more particularly as the head right of John B. Ketchum, granted to Thomas M. League, as the assignee of John B. Ketchum, by letters patent dated the thirtieth day of August, 1845; said land is situated in what was Robertson county, at the date of said patent. In the northern part of the same, forty miles west of the Trinity river, on the head waters of Chamber's creek; beginning at the northwest corner of a survey of 1,280 acres made for Rufus E. Campbell; corner in the prairie, a stake; thence south 60° west, with said Campbell's survey one thousand and seventy-seven varas to the southeast corner of a survey of 640 acres
4 made for George W. Foster, a stake and mound; thence north 30° west, with said Foster survey, at seven hundred and seven varas, a spring branch ½ vara wide, runs south at seventeen hundred and thirty-seven varas, the south corner of Daniel L. Henderson's survey, a stake and mound; thence north 60° east, with said survey, two thousand varas to the northwest corner of Henry B. Mitchell's survey, a stake and mound, from which a willow 10 inches in diameter bears south 66° 30′ east 92 varas, and a cottonwood 9 inches diameter bears north 48° east $78\frac{5}{10}$ varas; thence south 30° east, with said survey, at two hundred and fifty-seven varas to a spring branch, runs eastwardly at eighteen hundred and eighty-seven varas, corner in prairie on said line; thence south 60° west, at nine hundred and twenty-three varas, intersected the east boundary line of said Campbell's corner in prairie; thence north 30° west, one hundred and fifty varas to the place of beginning, said land is of the value of ten dollars per acre. The premises considered plaintiff sues and prays the usual process hereof against defendant Sansom.

And the remaining defendants, J. C. League, E. Y. League, E. A. Wells and C. Y. Wells, not being residents of the northern district or Texas, and not being found, and having failed to voluntarily appear to this action, plaintiff prays that an order be made
5 herein for said non-residents defendants to appear on or by a designated day, and plead answer or demur to this petition, and that notice be served on them personally, of such order, together with a certified copy of the same in Galveston, the county of their residence, and plaintiff prays your honors to hear proof and adjudge that he shall recover the said tract of land, and grant him a

writ of possession for the same, and also that he recover of defendants his aforesaid damages, and the annual rents, revenues, and profits of said lands up to the date of judgment, and his costs of suit, and all such other or further relief as the premises may entitle him to have or receive, and as in duty be will ever pray.

(Signed.) WELLBORN, LEAKE & HENRY,
Atty's for Plaintiff.

Endorsements: 141 cir. ct. E. J. Hart *vs.* (amended original petition) Marion Sansom, and others. Filed June 13, 1881, (signed) A. J. Houston, clerk. This suit is brought as well to try title as for damages. (Signed) Wellborn, Leake & Henry, Atty's for Plff.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

E. J. HART
vs.
MARION SANSOM *et al.* } No. 141.

Now come the defendants, J. C. League, E. Y. League, E. A. Wells, and C. G. Wells, by their attorneys, and leave of the court first having been had and obtained, file this their amended original answer as a substitute for their original answer, filed in this
6 court on the 7th day of December, A. D. 1881, and demur to plaintiff's amended original petition, and say that the matters and things therein contained, as in manner and form therein set forth, are not sufficient in law for him to have and maintain his action, and of this they pray the judgment of the court, and that they be dismissed with their costs.

(Signed) HUNT, LATHROP & HAYES,
Attorneys for Defendants, J. C. League, E. Y. League, E. A. Wells and C. G. Wells.

And if their demurrer be overruled then these defendants deny all and singular the allegations in plaintiff's said petition contained and require strict proof of the same. And further answering, these defendants say that they are not guilty of the injury complained of in the said petition, filed by the plaintiff against them, and they pray to be dismissed with their costs.

(Signed) HUNT, LATHROP & HAYES,
Attorneys for Defendants, J. C. League, E. Y. League, E. A. Wells, and C. S. Wells.

And for plea in this behalf these defendants say that they have had peaceable and adverse possession of the land described in the plaintiff's said petition under title, or color of title, for three years prior to the institution of this suit, and this they are ready to verify, and they plead the three years' statute of limitations in bar of plaintiff's right of action, and pray the judgment of the court quieting them in their title and possession, and for costs.

7 (Signed) HUNT, LATRHOP & HAYES,
Atty's for Defendants, J. C. League, E. Y. League, E. A. Wells, and C. G. Wells.

And for further plea these defendants say that they have had peaceable and adverse possession of the land described in the plaintiff's said petition, cultivating, using, and enjoying the same, and paying the taxes thereon, and claiming the same under a deed, or deeds, duly registered for five years prior to the institution of this suit, and this they are ready to verify, and they plead the five years' statute of limitations in bar of plaintiff's right of action, and pray the judgment of the court quieting them in their title and possession, and for costs.

(Signed) HUNT, LATHROP & HAYES,
Attorneys for defendants, J. C. League, E. Y. League, E. A. Wells, and C. G. Wells.

Endorsements: No. 141, Cr. Ct., E. J. Hart *vs.* Marion Sansom *et al.*, amended original answer of def'ts, J. C. League, E. Y. League, E. A. Wells, and C. G. Wells. Filed Jan. 23, 1882. Signed A. J. Houston, clerk.

Suit pending in the United States Circuit Court for the Northern District of Texas, at Dallas, Texas.

E. J. HART
vs.
MARION SANSOM, J. C. LEAGUE, E. Y. LEAGUE, E. A. WELLS, C. G. WELLS.

Now comes defendant, Marion Sansom, by his attorneys, leave of the court first had, and files this his first amended original
8 answer in lieu of and as a substitute for his original answer herein filed on the 8th day of December, 1881; and for answer excepts to plaintiff's petition, and says the same is insufficient in law to require him to answer thereto, and of this he prays the judgment of the court, &c.

(Signed) BROWN & RAMSEY,
(Signed) BENNERS & MILLER,
Atty's for Defendant, Sansom.

And further answering, the said defendant Sansom, by his attorneys, denies all and singular the allegations in plaintiff's petition contained, and of this he puts himself upon the county, &c.

(Signed) BROWN & RAMSEY,
(Signed) BENNERS & MILLER,
Att'ys for Deft. Sansom.

And further answering, the said defendant Sansom, by his attorneys, comes and defends the force and injury when, &c., and says that he is not guilty of the said supposed wrongs, injuries, and trespasses laid to his charge in plaintiff's petition, or any or either of them in manner and form as the said plaintiff hath thereof complained against him, and of this he puts himself upon the country, &c.

(Signed) BROWN & RAMSEY,
(Signed) BENNERS & MILLER,
Att'ys for Deft. Sansom.

And further answering, this defendant says: That heretofore, to wit, on or about the 23d day of January, 1876, this defendant entered into and made a written contract with his co-defend-
9 ants herein. That under and by the terms of said contract the land in plaintiff's petition described was by this defendant leased from his co-defendants herein for the period of five years, from the first day of February, 1876, to the first day of February, 1881. That this defendant agreed to pay to his co-defendants, as rent for said land, the sum of one hundred dollars per year, payable on the first day of February, 1877, and on the first day of February of each year thereafter during the continuance of this lease. That this defendant agreed to pay, during the continuance of this lease, all sums of money that might become due and payable for taxes on said property. That it was agreed in said contract that the co-defendants of defendant herein should have a lien and mortgage upon the property and improvements of all kinds that might be by this defendant put and placed upon said leased premises. That in said contract it was further agreed that at the expiration of said contract this defendant and his co-defendants should each select an appraiser, that said appraisers so selected should appraise separately the value of the land and the value of the improvements thereon placed by this defendant. That after said appraisement made as aforesaid, this defendant could and should, if he so elected, purchase said land from his co-defendants, paying therefore the value of said land without regard to the improvements thereon, as found by said appraisers, that this
10 defendant should have ninety days under said contract after the appraisement as aforesaid within which to elect whether or not he would purchase said land at its appraised value. That in the event this defendant did not purchase said land at its appraised value either during the continuance of the contract or at its termination, his co-defendants were authorizsd to sell said land, and after said sale the separate value of said land and of said improvements were to be estimated by appraisers in the way hereinbefore indicated, and that the value of said improvements so assessed shall thereupon be paid to this defendant by his co-defendants.

This defendant charges that he has done all and everything as in said contract he agreed to do. That he entered into possession of said premises under said contract in good faith, and without notice of the claim in plaintiff's petition, asserted more than one year next before the commencement of this suit. That in good faith and without notice of plaintiff's claim, or of any adverse claim to said land, and before the institution of this suit, this defendant, under the said contract herein referred to, did make permanent and valuable improvements on said land and premises of the value of three thousand and four hundred dollars. That said improvements were as follows, viz: Fencing six hundred and forty acres of said land, said fencing being of the reasonable value of six hundred and forty dollars; building a one story house on said premises, said

11 house being of the reasonable value of one hundred dollars; digging and making one well on said premises of the reasonable value of fifty dollars; to plowing and breaking up and putting in cultivation five hundrod and fifty acres of land on said premises of the reasonable value of two thousand seven hundred and fifty dollars.

Defendant further represents that at the expiration of said above described contract, the same was, by an agreement in writing to said contract attached, continued in full force and effect for the term of five years, commencing on the first day of February, 1881, this defendant agreeing to pay the sum of two hundred and twenty-five dollars yearly rent for said premises, to his co-defendant E. Y. League, during the existence of said contract, commencing Feb'y 1st, 1881. That defendant is now in possession of said land by virtue of said above described contract. That at the time of said renewal of said lease contract, this defendant had no notice of the claim to said premises, by the plaintiff in this suit asserted.

The premises considered, this defendant prays judgment for the value of the improvements herein declared, in the event the plaintiff is successful herein, for his costs and for general relief, &c.

(Signed) BROWN & RAMSEY,
(Signed) BENNERS & MILLER,
Att'ys for Deft. Sansom.

12 Endorsement: No. 141. E. J. Hart *vs.* Marion Sansom, first amended original answer of defendant Sansom. Filed Jan. 24, 1882. Signed, A. J. Houston, clerk.

January 6th, 1883.

E. J. HART
vs.
M. SANSOM *et al.* } No. 141.

This day came the parties by their attorneys, and thereupon came a jury of good and lawful men, to wit: Hal Craddock, W. C. Petty, R. J. Patton, J. W. Baird, W. A. Lang, J. I. Williams, J. D. Carroll, E. J. Hicks, H. B. Lang, Amos Dorn, H. Ritchie, and G. W. Johnson, and after hearing the evidence, the argument of counsel, and the charge of the court, returned the following verdict into open court, to wit: "We, the jury, find for the defendants. (Signed) J. W. Baird, Foreman." It is therefore considered by the court that the said plaintiff take nothing by his suit, and that the said defendants go hence without day, and that they have and recover of and from the plaintiff their costs in this behalf expended, for which they may have execution. It is further ordered that execution issue in favor of the officers of this court against each party, respectively, for their costs in this behalf incurred.

In Circuit Court United States for Northern District Texas, at Dallas.

E. J. HART
vs.
M. SANSOM and others. } No. 141.

Be it remembered, that on the trial of this cause the plain-
13 tiff read in evidence to the jury, without objection—

1st. The patent from the Republic of Texas to Thomas M. League, as assignee of John B. Ketchum, for the land in controversy. Recorded in Johnson county, Dec. 9, 1879.

2d. Original deed from Thomas M. League to John Fitzgerald for the land in controversy, dated 19th August, 1846, and recorded in Johnson county Dec. 9, 1879. This deed conveys the fee simple estate in said land to said John Fitzgerald, and contains a covenant of warranty in the following words, to wit: "And I do hereby bind myself, my heirs and administrators, to warrant and forever defend all and singular the aforesaid premises unto the said John Fitzgerald, his heirs, executors, administrators, and assigns, against every person whomsoever lawfully claiming, or to claim the same, or any part thereof, by right, title, interest, or claim, through or under me."

3d. Original deed from said John Fitzgerald to E. J. Hart, the plaintiff in this case, conveying the fee simple estate in the land in controversy, said deed dated 5th July, 1855, and recorded in Johnson county Dec. 9, 1879. This deed contains covenant of warranty in the following words, to wit: "I will, and my heirs, executors, and administrators shall, warrant and defend the same to the said Edmond J. Hart, his heirs and assigns, against the lawful claims and demands of all persons," and rested.

14 Whereupon the defendant offered to read in evidence a judgment and the judgment roll of a judgment rendered in the district court of Johnson county, in the State of Texas, on the 24th day of August, 1875, in the case of Esther J. League and others against Virgil Wilkerson and others. The petition as it appears in said record reads as follows, to wit:

In District Court, August Term, 1873.

THE STATE OF TEXAS, *Johnson County.*

To the Honorable District Court of said Johnson County:

The plaintiffs, Esther Y. League, Thomas J. Leauge, John C. League, and Ester A. Wells complain of Virgil Wilkerson, Angie Hoyle, Susan E. Hoyle, Latimore L. Hoyle, Gertrude Hoyle, Emma N. Mercer, and L. D. Mercer, her husband, Pauline White, and her husband, ——— White, whose given name is unknown to plaintiffs, J. D. White, Peter W. Wynne, H. G. Pannel, R. F. Pannel, Joseph F. Crosby, George Flournoy, Aseneth Sherwood, David B. Sher-

wood, Orlanda Dorsey, and E. J. Hart, and allege that the plaintiffs and the defendants, George Flournoy, Aseneth and David B. Sherwood reside in the county of Galveston, State of Texas; that the defendants, Virgil Wilkerson, Angie, Martha C., John C., Susan E. Latimore, L. and Gertrude Hoyle, and Emma N. and L. D. Mercer, reside in the county of Johnson, same State; the defendants, Pauline White, and ——— White, her husband, and Peter
15 W. Wynne reside in the county of Travis, same State; the defendants, J. D. White, H. G. Pannel, R. F. Pannel, and Josiah F. Crosby reside in the county of Harris, same State; the defendant, Orlando Dorsey, resides in the city and State of New York, and the defendant, E. J. Hart, resides in the city of New Orleans, State of Louisiana.

Plaintiffs further allege that Thomas M. League, the ancestor of plaintiffs, was, in his lifetime, and at the time of his death, seized, in fee simple, and possessed of all that certain tract of land known as the J. P. Ketchum survey, situated and described as follows, to wit: In Johnson county, on the headwaters of Chamber's creek, beginning at the northwest corner of a survey of 1,280 acres, made for Rufus E. Campbell, corner in prairie, a stake; thence south 60° west with said Campbell survey, one thousand and seventy-seven varas, to the southeast corner of a survey of 640 acres, made for George W. Foster, a stake and mound; thence north 30° west, with said Foster survey, at seven hundred and seven *varas* (707) varas, a spring branch ½ vara wide runs south at one thousand and seven hundred and thirty-seven *varas* (1,737) varas, the south corner of Daniels L. Henderson's survey, a stake and mound; thence north 60° east with said survey, two thousand (2,000) acres to the northwest corner of Henry B. Mitchell's survey, a stake and mound; from which a willow, 10 inches in diameter, bears south 66°
16 30′ east, 92 varas, and a cotton-wood, 9 inches in diameter, bears north 48° east, $78\frac{5}{10}$ varas; thence south 30° east with said survey at two hundred and fifty-seven varas, (257) a spring branch runs eastwardly at one thousand eight hundred and eighty-seven (1,887) varas, a corner in prairie on said line; thence 60° west, nine hundred and twenty (923) varas intersects the east boundary line of said Campbell's corner in prairie; thence north 30° west, one hundred and fifty (150) varas to the place of beginning, which said tract of land was granted to said Thomas M. League, assignee of John B. Ketchum, by letter patent, bearing date August 30th, 1845, as will appear by reference to a certified copy of said patent, which is herewith filed, marked Exhibit "A," and will be read in evidence on the trial of this suit.

That the said Thomas M. League died on the 5th day of November, A. D. 1865, intestate; that the plaintiff, Esther Y. League is the surviving widow, and the other plaintiffs (except Clinton G. Wells) are the children, and constitute all the heirs-at-law of said Thomas M. League, deceased; that there has been no administration granted upon the estate of said Thomas M. League, there being no necessity

therefor; that the above-described tract of land at the death of the said Thomas M. League, deceased, and passed to plaintiff by inheritance, whereby they became seized and possessed of the same in fee simple as tenants in common. Plaintiffs further allege that
17 afterwards, to wit, on the first day of January, A. D. 1873, and on divers other days and times between that day and the commencement of this suit, the defendant, Virgil Wilkerson, returned upon said premises and ejected plaintiffs therefrom, and unlawfully withholds from plaintiffs the possession thereof to their damage, ten thousand dollars. Plaintiffs further allege that on the 29th day of October, 1870, the defendant, Orlando Dorsey, conveyed, by deed of conveyance duly executed, three-fourths of said tract of land to me, G. H. Sherwood, and the other defendants, George Flourney, H. P. Pannel, R. F. Pannel, and Josiah F. Crosby, reserving in said deed the remaining one-fourth of said tract of land to himself, which said deed of conveyance is duly recorded in the office of the clerk of the district court of said Johnson county, in book I of deeds, on pages 415, '16, and that since the date of said deed the said G. H. Sherwood has departed this life, leaving surviving him his widow, the defendant Aseneth Sherwood, and the defendant, David B. Sherwood, who are the only heirs and distributees of the estate of said G. H. Sherwood deceased; that on the 20th day of December, A. D. 1870, one M. V. B. Powell conveyed by deed said tract of land to A. C. Hoyle, which said deed of conveyance is recorded in the office of the clerk of the district court of said Johnson county, in book 4 of deeds, on pages 36, 90, 370, and since the date of the deed last aforesaid the said A. C. Hoyle has departed
18 this *this* life, leaving surviving him his widow, the defendant, Angie Hoyle, who, together with the defendant, S. D. Mercer, are the administrators of his estate, and the defendants, Emma M. M. Mercer, Martha C., John C., Susan E., Latimore S., and Gertrude Hoyle, who are his children and heirs-at-law; that on the 4th day May, A. D. 1872, one James Denney, by P. W. Wynne, his agent and attorney-in-fact, conveyed by deed one hundred and sixty acres of said tract of land to the defendant, Pauline White, and on the day and year last aforesaid conveyed by deed one hundred and sixty acres of same tract of land to J. D. White, which said deeds are recorded in the office of the clerk of the district court of said Johnson county, in book of deeds, on pages 677, 8, 9; that on the 6th day of November, 1872, W. H. Griffin and M. E. Griffin, his wife, conveyed by deed 320 acres of said tract of land to the defendant, Peter W. Wynne, which said deed of conveyance is recorded in the office of the clerk of the district court of said Johnson county, in book of deeds, on page 131, and that the defendant, E. J. Hart, sets up some pretended claim and title to said land. Plaintiffs further allege that the defendant, Virgil Wilkerson, is a naked trespasser upon the land of plaintiffs, and that the several other defendants several deeds which appear upon the records of deeds of Johnson county, as aforesaid, are fraudulent and void, and that the

19 said pretended claims and deeds and each and all of them cast a cloud upon the title of plaintiffs. Now, therefore, the premises considered the plaintiffs pray that the defendants, Orlando Dorsey and E. J. Hart, be cited by publication, and that the other defendants be cited as the law directs to answer this petition, and that they have judgment that the cloud upon the title of the plaintiffs created by the several deeds aforesaid be removed, and that the said deeds and each and all of them be declared null and void, and be cancelled and discharged of record, and that the title of plaintiffs in and to said premises and every part thereof may be confirmed and established as against said defendants and each and every of them and all persons claiming through or under them, and they pray for a writ of possession to issue to put plaintiffs in possession of said land and to eject defendants therefrom, and they pray for damages and for costs and for all such other general and special relief as they may be entitled to, and as in duty bound, &c.

(Signed) DAVIS & OTIS,
Plaintiff's Attorney.

Filed June 11, 1873.
(Signed) E. J. KOUNS, *Clerk.*

It further appears from said record, that affidavit stating the grounds for citing by publication the said E. J. Hart, was made in said court, as follows:

"THE STATE OF TEXAS, *Johnson County:*

Before the undersigned, clerk of the district court of said Johnson county, this day personally appeared M. A. Otis, attorney for the plffs. in case No. 836, on the docket of the district court of
20 Johnson county, Texas, wherein Esther Y. League and others are plaintiffs, and Virgil Wilkerson and others are defendants, and made oath that Orlando Dorsey and E. J. Hart, defendants in the aforesaid suit, are non-residents of the State of Texas, and he prays that said defendants be cited by publication, as the law directs.

(Signed) M. A. OTIS.

Sworn to and subscribed to this 11th day of June, 1873.
C. G. KOUNS, *Cl'k.*

Filed June 11, 1873.
(Signed) C. G. KOUNS, *Cl'k.*"

It further appears from said record, that on the 24 June, 1873, a citation was issued in said cause, by the clerk of said district court of Johnson county, properly addressed to the sheriff of said county of Johnson, commanding him to "summon by publication, in the manner provided by law, E. J. Hart, who resides in the city of New Orleans, State of Louisiana, to be and appear personally before our district court, to be held within and for Johnson county, at the court-house in Cleburne, on the 2d Monday in August, 1873, then and there to answer the petition of the plaintiffs in said cause."

(A correct statement of the names of all of whom, as well as of the defendants in said cause, as well as a sufficient brief statement of the cause of action as declared on in the foregoing petition, was given in said citation.)

The attesting clause of said citation is in the following words, to wit:

"Given under my hand and the seal of the district court of
21 Johnson county, at office in Cleburne, this June 24th day, 1873.

(Signed) C. Y. KOUNS, *Cl'k D. C., J. C. T.*
By JOHN B. HUDSON, *Dep'y.*"

And on said writ is indorsed the following words, to show the fact and manner of serving the same:

"Rec'd June 25, 1873, and returned August 1, 1873. Executed by having this citation published in the Cleburne Chronicle, a newspaper published in the town of Cleburne for four successive weeks before return day.

(Signed) O. P. ARNOLD, *Shff.*

Said record shows service upon the other defendants and that the case came on for trial, when the following final decree was rendered and entered of record therein. That is to say:

September 10th, 1874.

ESTHER Y. LEAGUE
vs.
H. H. WILKERSON & VIRGIL WILKERSON. } No. 836.

Now at this time this cause was called for trial, when came the plaintiff, by her attorneys, and announced themselves ready for trial, and the defendants being called came not, but wholly made default.

24th Day of August, A. D. 1875.

ESTHER Y. LEAGUE *et al.*
vs.
VIRGIL WILKERSON, *et al.* } No. 836.

This day came on to be heard the above-entitled cause upon the issue joined between the pltff's and the deft., Virgil Wilkerson, and upon a writ of inquiry heretofore awarded against the other defendants, except the administrator and heirs
22 of A. C. Hoyle, deceased, who disclaim all right and title to the land hereinafter described, and thereupon came a jury of good and lawful men, to wit: A. J. Reeves, and eleven others, who upon their oath do assess the damages against the defendants, Orlando Dorsey and E. J. Hart who were served by publication, and made default. 1st, the land in controversy was patented to Thos. M. League assignee of J. B. Ketchum, in the day of August, 1845, patents read in evidence; 2d. Plaintiffs proved by Hamilton Stuart and John C. League, that Thomas M.

League the patentee of said land was dead, and that the plaintiffs were his widow and children, and hence at law as alleged in their petition. 3d. That E. J. Hart claimed said land, but had no title of record in Johnson county, Tex., and none whatever known to plaintiffs. 4th. That the defendants, Orlando Dorsey had by his deed, dated on the 29th day of Oct., 1870, conveyed ¾ of said tract of land to the defendants Sherwood, Flournoy, Pannel, Pannel and Crosby, reserving in said deed ¼ interest in said land to himself, said Orlando Dorsey, that said deed was recorded in the office of the district clerk of Johnson county in book on page , and that said defendant, Orlando Dorsey, had no title to said land of record in said Johnson county, and none whatever known to plaintiffs, return into open court, the following verdict:

"We the jury find for the plaintiffs, and that they recover the land described in plaintiff's petition.

"A. J. REEVES, *Foreman.*"

23 It is therefore considered by the court that the plaintiffs recover of the defendants the premises described and bounded as follows: 640 acres, known as the J. B. Ketchum survey, in Johnson county, on the head-waters of Chambers' creek, beginning at the N. W. cor. of a survey of 1,280 acres for R. E. Campbell; thence S. 60 W. with said Campbell survey 1,077 vrs., to S. E. cor. of a survey of 640 acres, made for J. W. Foster; thence N. W. with said Foster survey 707; a spring branch ½ vara wide runs S. at 737 vrs. to S. cor. of Daniel S. Henderson survey; thence N. 60 E. with said sur. 2,000 vs. to the W. cor. of H. B. Mitchell's sur., a stake and mound from which a willow 10 inches dia. brs. S. 66° 30′ E. 92 vrs., and a cotton wood, 9 in. dia. brs. N. 48° E. $78\frac{5}{10}$; thence S., 30 E., with said survey at 257 vs., to a spring branch, runs E. at 1,887 vrs. cor. in prairie; thence S. 60° W. at 923 vrs., intersecting the E. B. line of said Campbell survey; thence N. 30° W. 150 vrs. to the place of beginning.

And it [is] further ordered by the court that the several deeds in plaintiffs' petition mentioned be, and the same are hereby, annulled and cancelled, and for naught held, and the cloud thereby removed; and it is hereby further ordered by the court that the plaintiffs do have and recover of and from the said defendants, except the heirs and administrators of A. C. Hoyle, deceased, all costs by them in this behalf expended, for which execution may issue.

24 It is further ordered that execution issue against each party respectively for the costs by them herein incurred in favor of the officers of the court.

To the reading of which degree and proceedings the plaintiff, by his counsel, objected, on the following grounds:

1st. That the petition in said case did not show any cause of action against the defendant therein, E. J. Hart; that it showed he was not in possession of the land in controversy, and did not

state any fact showing that he held any title or pretended title to said land casting a cloud or doubt on defendant's title, and because the general allegation that he had set up some pretended claim to said land without alleging what such claim was, did not allege any wrong done by him, or state any charge against which he could defend or on which a judgment or decree could be rendered by said court.

2d. That no judgment or decree was rendered in said case against the defendant therein, E. J. Hart, because that part of the judgment taken against him in common with all of the other defendants for the recovery or possession of the land in controversy does not bind him, because the pleadings not having charged him with the possession of said land, did not authorize a judgment against him for its recovery, and that portions of said decree removing clouds from the title being confined in its terms to such clouds as were created by deed did not reach him, because he was not charged as holding any such deed.

3rd. Because the record showed that the pretended cause of action set out in said petition was, if anything, a personal action against the defendant, E. J. Hart, and was not a proceeding *in rem*, and that the decree was rendered against him without lawful notice and by a court not having jurisdiction over the said defendant.

4th. Because the pretended return of service of said citation by publication does not show or purport that it was made by the sheriff of, or by any authorized officer of, Johnson county, Texas. The only thing designating that the person signing said return had or acted in any official capacity being the letters "shff" following his name, which do not indicate anything of which the court could take notice.

5th. Because the said pretended return fails to show that the said writ was published in a newspaper published in Johnson county, State of Texas, or in what county or State it was published, as the law required.

6th. Because said record failed to show that said decree had been recorded in the office of the county clerk of Johnson county, Texas.

All of which objections were overruled by the court, and the portions of said record set out above, and which was all of the same that relates to the defendant therein, E. J. Hart, and read in evidence by the defendants, to which ruling plaintiff, by his counsel, excepted, and tenders this, his bill of exceptions thereto, which is allowed.

In the further progress of the trial of said cause, it was proved and admitted that the defendants in this cause are the surviving widow and children, and heirs-at-law of the said Thomas M. League, the patentee of the tract of land in controversy, and that the defendant, Marion Sansom, held possession of said land as their tenant under a written lease of the same, dated January 26, 1876, which was recorded in the county clerk's office of said county on the first day of February, A. D. 1876, and that the original petition

of the plaintiff in this cause was filed in this court on the 31st day of January, A. D. 1881.

On this proof the court charged the jury, 1st. That the plff. through the patent and deeds aforesaid, had shown title in himself. 2d. That the defendants had failed to show title under the statute of limitations of either three or five years, but that said decree rendered in the district court of Johnson county, divested plaintiff of the title to said land, and further charged the jury to find a verdict for the defendants."

Plaintiff at the time excepted to so much of said charge as gives effect to said decree of the district court of Johnson county, and to so much thereof as directed the jury to find a verdict for defendants.

And he now tenders this his bill of exceptions to said
27 rulings and said charges, and prays that the same be allowed sealed and signed and filed and made a part of the record in this case, and it is accordingly so ordered.

Given under my hand and scrawl for seal, this the 15th day of January, A. D. 1883.

(Signed) A. P. McCORMICK, [SEAL.]
U. S. Dis't Judge.

Endorsement: No. 141—E. J. Hart *vs.* M. Sansom, et al.—Plaintiffs bill of exceptions—Filed Jan'y 15, 1883. (Signed) A. J. Houston, clerk.

Know all men by these presents, that we, E. J. Hart, as principal and —— as sureties, are held and firmly bound unto Marion Sansom, J. G. League, E. G. League, E. A. Wells and C. G. Wells, in the full sum of five hundred dollars, to be paid to the said Marion Sansom, J. G. League, E. G. League, E. A. Wells and C. G. Wells, their certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this —— day of ———, in the year of our Lord one thousand eight hundred and eighty——.

Whereas, lately, at a term of the circuit court of the United States, for the northern district of Texas, at Dallas, in a suit de-
28 pending in said court, between E. J. Hart as plaintiff and the said Marion Sansom, J. G. League, E. Y. League, E. A. Wells and C. G. Wells as defendants, a judgment was rendered against the said E. J. Hart, and the said E. J. Hart having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Marion Sansom, J. G. League, E. Y. League, E. A. Wells and C. G. Wells, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next.

Now, the condition of the above obligation is such, that if the said E. J. Hart shall prosecute said writ of error to effect, and an-

swer all damages and costs, if he fail to made his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

(Signed) E. J. HART. [SEAL.]
Per JNO. L. HENRY, *his Att'y.*
(Signed) S. J. ADAMS. [SEAL.]
(Signed) J. L. LEONARD. [SEAL.]

Approved by—

(Signed) A. P. McCORMICK,
U. S. Dist. Judge, sitting in Circuit Court on the trial of the case,

MARCH 24TH, 1883.

Endorsement: No. 141. E. J. Hart, pl'ff in error, *vs.* Marion Sansom *et al.*, def'ts in error. Writ of error bond. Filed March 24, 1883. (Signed) A. J. Houston, clerk.

29 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States, for the northern district of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between E. J. Hart, plaintiff, and Marion Sansom, J. C. League, E. Y. League, E. A. Wells, and C. G. Wells, defendants, a manifest error hath happened, to the great damage of the said E. J. Hart, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command, you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court the 24th day of March, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] A. J. HOUSTON,
Clerk of the Circuit Court of the United States, at Dallas, Texas.

Allowed by—

A. P. McCORMICK,
U. S. Dist. Judge, for the Northern Dist. of Texas, who was sitting in the Circuit Court on trial of the case.

MARCH 24, 1883.

Endorsed: No. 141. E. J. Hart, pl'ff in error, *vs.* Marion Sansom *et al.*, def'ts in error. Writ of error. Issued March 24, 1883. A. J. Houston, clerk.

30 The United States of America, to Marion Sansom, J. G. League, E. Y. League, E. A. Wells, and C. G. Wells, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, at Dallas, wherein E. J. Hart is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable A. P. McCormick, U. S. dist. judge of the northern district of Texas, this 24th day of March, in the year of our Lord one thousand eight hundred and eighty-three.

A. P. McCORMICK,
U. S. Dist. Judge, sitting in the Circuit Court on the trial of this case.

31 Endorsed: No. 141. E. J. Hart, plaintiff in error, *vs.* Marion Sansom, *et al.*, Deft's in error, Citation in error. I hereby accept service of within citation, and waive legal process, this 24 March, 1888, A. S. Lathrop, att'y of record for defendants. Filed, April 21, 1883, A. J. Houston, Clerk.

32 UNITED STATES OF AMERICA,
Northern District of Texas, at Dallas.

I, A. J. Houston, clerk of the United States circuit court for the northern district of Texas, at Dallas, do hereby certify that the foregoing twenty-eight pages contain a full, true, and correct transcript of plaintiff's amended original petition, the amended original answer of defendants J. C. League, E. Y. League, E. A. Wells, and C. G. Wells, the amended original answer of defendant Marion Sansom, the judgment of the court, the plaintiff's bills of exception, the writ of error, bond, and the original of the writ of error, and citation in error in cause No. 141, law, on the docket of said court, and styled E. J. Hart *vs.* Marion Sansom and others, all of which appears from the records of said court.

In testimony whereof, I have hereunto affixed the seal of said court, at Dallas, Texas, and the signature of the clerk thereof, this 21st day of July, A. D. 1883.

A. J. HOUSTON,
Clerk of the U. S. Circuit Court for the Northern District of Texas, at Dallas.

Endorsed on cover: N. Texas C. C. U. S. No. 958. E. J. Hart, plaintiff in error, *vs.* Marion Sansom, J. C. League, E. Y. League, E. A. Wells, and C. G. Wells. Filed 18th September, 1883.

110-157

FILED
DEC. 7 1889
JAMES H. McKENNEY, CLERK

IN THE SUPREME COURT UNITED STATES.

E. J. HART,
vs.
M. SANSOM, ET AL. } No. 958.

Brief for Plaintiff in Error.

Hart, the plaintiff in error, a citizen of Louisiana, brought his action of trespass to try title in the United States Circuit Court, Northern District of Texas, against Sansom, League and others.

The defendants filed pleas of not guilty and the statute of limitations. The latter plea was not supported by the evidence, and upon it, the jury was instructed to find in favor of plaintiff.

Under the other plea the jury was directed to find a verdict for the defendants, and they rendered their verdict accordingly, upon which there was a judgment.

To reverse this judgment the present writ of error was taken.

The bill of exceptions shows the plaintiff read in evidence a patent from the Republic of Texas to Thos. M. League; a deed from T. M. League, with general warranty to John Fitzgerald and a deed with general warranty from Fitzgerald to E. J. Hart, the plaintiff.

The defendants read in evidence a transcript of a suit in the District Court of Johnson Co., Texas, brought subsequent to the deeds above recited, wherein the defendants to this suit, except Sansom, a tenant, were complainants claiming as heirs of T. M. League, and E. J. Hart together with numerous other parties were defendants.

This suit as against one of the defendants, Wilkerson, in possession of the premises, was an action of trespass to try title. Against other defendants it charged that they held certain specified deeds, which were clouds upon plaintiff's title.

As to E. J. Hart, the only allegation was "that the defendant, E. J. Hart, sets up some pretended claim and title to said land." P. 9.

He is alleged to be a resident of Louisiana, and an order of publication is asked.

The prayer is that the cloud upon the title of the plaintiff created by the several deeds be removed, and that they be cancelled, and that the title of the plaintiffs may be established against the defendants. pp. 8–10.

Publication was made in the *Cleburne Chronicle*, and on the trial of the case, no appearance having been entered for Hart, there was a default, and a verdict and judgment was rendered in favor of plaintiffs for the recovery of the land, against the defendants generally.

It was further decreed by the Court that the several deeds in plaintiff's petition mentioned be cancelled and annulled as clouds on the title.

On the trial below it was admitted that T. M. League, the patentee, was dead, and that the plaintiffs in the action were his heirs.

The plaintiff in error objected to to the introduction of this judgment in evidence.

1. Because the charges in the petition as to the defendant Hart, were so indefinite and uncertain as not to constitute a cause of action or suit in which a judgment or decree could be entered.

2. That no judgment was rendered against Hart. That part of the judgment taken against him in common with all the other defendants, did not bind him.

3. Because if any cause of action was stated against said Hart it was in *personam*, and not in *rem*, and no personal service having been made, the Court never acquired jurisdiction as to him.

4. Because the record failed to show service by publication as the Texas statute required.

The Court admitted the record, to which ruling exception was duly taken.

The overruling of the objections to the admissibility of the record, and the direction to find a verdict, constitute the assignment of error.

The judgment in the State court is attempted to be supported by the statute of Texas for citing absent defendants. The statute is as follows:

> "If the plaintiff shall, at the time of instituting his suit, or at any time during the progress thereof, make affidavit before the clerk of the court that the defendant is not a resident of this State, or that he is absent from this State or that he is a transient person, or that his residence is unknown to the affiant, the clerk of the court shall issue a citation to the proper officer, (which citation shall contain a brief statement of the cause of action,) commanding the said officer to summon the defendant by making publication of the citation in some newspaper published in the county where the writ issued for four weeks previous to the return-day of such process."
>
> Paschal's Dig. of the Laws of Texas, vol. 1, art. 25.

The return of service reads as follows:

> "Received June 25, 1873, and returned August 11, 1873, executed by having this citation published in the *Cleburne Chronicle*, a newspaper published in the town of Cleburne for four successive weeks before return-day.
>
> O. P. ARNOLD,
> *Sh'ff.*

The statute provides for publication in all cases against non-residents.

But judgments by default rendered on such publication possess no binding force, in the courts of the United States except in actions in *rem*, where property is brought under the control of the court by seizure or some equivalent act, or where the object of the action is to reach and dispose of property in the State by enforcing a lien respecting the same or to partition it.

The fact that the non-resident ow ns property in the State is not material, unless it is brought under the control of the court.

Pennoyer vs. *Neff*, 95 U. S., 727, 734.

The proceeding in the Johnson county court as against Hart was, in no sense, a proceeding in *rem*. He was not alleged to be in possession of the property. He was made a party merely because it is alleged he claims some pretended title to the land, and that such pretended claim cast a cloud upon the title of plaintiffs. No privity was alleged to exist between Hart and the other defendants.

As against him, therefore, the suit, if effective at all, can only be so as a bill to remove a cloud upon title.

The relief afforded on such a bill is entirely personal. It orders the defendant to deliver up his deed, which the court declares void or orders to be cancelled.

Such a bill need not be brought where the land is situated, but wherever the defendant is found.

Finch vs. *Edmonston*, 9 Tex., 510;
Vandever vs *Freeman*, 20 Tex., 336.

We submit, therefore, that the judgment by default was void, for want of jurisdiction over the defendant, Hart.

If this was a case where service by publication was warranted, the return in the record failed to show that the publication was made by the proper officer or in a newspaper published in the county of Johnson.

Blossom v. *Litchfield*, 17 Tex., 649;
Allen v. *Wyser*, 29 Tex., 153.

2. The court was without jurisdiction to entertain the suit or grant the relief asked for another reason.

The general rule that a party out of possession cannot file a bill to remove a cloud upon his title, prevails in Texas.

Nor can parties in the courts of that State unite in the same suit an action of trespass to recover the possession of land, as against one defendant, and a bill to remove a a cloud on the title, as against other defendants.

In *Herrington* vs. *Williams*, the Court say:

> "To authorize a bill *quia timet*, or a bill of peace, the party must not only hold the legal title, but he must be in actual possession of the land. We know of no principle which will warrant a decree in favor of a party who may hold the legal title, but is out of possession. *Although our system authorizes the blending of the principles of law and equity in administering justice it neither requires nor sanctions the blending of various and contradictory rights and causes of action in the same suit.*"
>
> 31 Tex., 457.

3. The record admitted by the court below did not estop Hart from asserting his title to the land.

This title consisted of a warranty deed from the ancestor of the defendants in the present action, who were the complainants in the action in the State court.

This title was never passed upon by the State court. There was no allegation as to what was the title held by Hart, nor any cause of action stated against him. There was no specific judgment sought against him.

The judgment was that the plaintiffs recover of the defendants the premises, and that the several deeds in the petition mentioned be cancelled as clouds on the title (p. 12).

The only proof as to Hart was that "he claimed the land, but had no title of rec ord in Johnson County," (p. 12.)

Plaintiffs did not claim that Hart was in possession. On the contrary, they alleged the possession to be in Wilkinson. Accordingly, there could be no judgment against Hart for the recovery of the land, and the relief as to the clouds on the title was confined to such clouds as were created by the specified deeds.

The plaintiffs could relieve themselves from the estoppel created by the warranty deed of their ancestor only by showing that such deed had been invalidated or discharged by the act of the party or the law.

We submit that the proceeding in the Johnson County court did not have this effect.

Cromwell vs. *County of Sac*, 94 U. S., 606.

The case may be briefly stated thus:

The ancestor of the defendants in this suit sold and conveyed the land for which this suit is brought to Hart, the plaintiff. He covenanted for himself and his heirs, the defendants, to warrant and defend the title so conveyed.

After his death the said defendants, as heirs, asserted title in themselves, and while in their suit admitting they have notice of Hart's title and the place of his residence, (p. 15,) they take advantage of the forms of the law to publish notice to him in an obscure country newspaper, take judgment by default, and now claim by such a proceeding to have defeated a title which they were bound to uphold.

To allow the judgment to have such an effect would be to permit the defendants in error to take advantage of their own wrong.

We submit that the the judgment should be reversed.

W. HALLETT PHILLIPS,
H. J. LEOVY,
For Plaintiff in Error.

110-151

IN THE

SUPREME COURT OF THE UNITED STATES.

E. J. HART
vs.
M. SANSOM, *et al.* } No. 958.

Brief of Defendant in Error.

The statement of the nature and result of this suit, as made in the brief of plaintiff in error, is correct.

The bill of exceptions show that the plaintiff read in evidence a patent from the Republic of Texas to Thomas M. League, as assignee of John B. Ketchum, for the land in controversy. A deed from Thomas M. League to John Fitzgerald, dated August 19, 1846, and deed from John Fitzgerald to E. J. Hart, dated July 5, 1855. These deeds were not recorded in Johnson County, where the land is situated, until Dec. 9, 1879.

The defendants read in evidence a transcript of a suit in the District Court of Johnson County, Texas, brought at the August Term, 1873, wherein the defendants to this suit, except Sansom, who is merely a tenant, were plaintiffs and E. J. Hart, the plaintiff herein, together with other parties, was defendant, plaintiffs sueing for the land, as heirs of Thomas M. League. On the 24th of August, 1875, upon

the verdict of a jury, the District Court of Johnson County, rendered its judgment in favor of the plaintiffs that they recover of the defendants the land in controversy.

To the reading of this transcript and judgment plaintiffs objected, for the reasons set forth in his brief.

The only questions for consideration by the Court in this case are, did the circuit court err in admitting this transcript in evidence, and was the judgment rendered in said cause, such a judgment as would preclude the plaintiff from recovering in this suit.

At the time the suit in Johnson county was commenced Hart was a non-resident of the State of Texas, being a citizen of the State of Louisiana, and he was cited by publication, according to the laws of Texas.

It was objected that "if this was a case where service by publication was warranted, the record failed to show the publication was made by the proper officer or in a newspaper published in Johnson county."

The citation directed the sheriff of Johnson county to summon by publication E. J. Hart to appear at the Courthouse door in *Cleburne*, Johnson county, and the sheriff's return shows the same was published according to the laws of the State of Texas, in the *Cleburne Chronicle*, a newspaper published in the town of Cleburne.

Transcript, pages 21 and 22.

The objection is that the return does not show that Cleburne is in Johnson county, and that the sheriff only signed "Sh'ff" after his name. It is submitted that this return is sufficient, because the court had judicial knowledge that Cleburne was the county seat of Johnson county, and that O. P. Arnold was sheriff of that county.

If, however, there was any defect in the return, such de-

fect could only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally.

Pennoyer vs. *Neff*, 5 Otto, page 721;
Freeman on Judgments, sec. 126, and note.

It is not disputed that the Texas statute provides for publication in all cases against non-residents, and that all requirements of the statute to obtain the publication were complied with.

Plaintiff in error contends that the judgment rendered in the Johnson County District Court by default against Hart has no binding force, because the same was by publication. That it was not an action *in rem;* that the property of defendant was not brought under the control of the court by seizure or some equivalent act. And to support his position, relies on the case of *Pennoyer* vs. *Neff*, 95 U. S., 727, 734.

The case in Johnson county is entirely different from the case cited. In the case under consideration, the plaintiffs assert that Hart sets up some pretended *claim* and *title* to the land, which is situated in the county where the suit is brought, and seeks to recover the land from Hart. The plaintiffs could not attach or sequester the land, for none of the causes given by the statute for such remedies existed. It is stated that Hart makes some claim or title to the land, and this necessarily affects its value, and suit is necessary to determine the same. Hart is a resident of Louisiana, and unless he voluntarily chooses to come in and defend, the plaintiffs are remediless, unless this suit is substantially a suit *in rem*.

In *Pennoyer* vs. *Neff*, page 27, the Court say:

"Such service may also be sufficient in cases where the object of the action is to reach and dispose of prop-

erty in the State, or of some interest therein, by enforcing a contract or lien, or to partition it among different owners. In other words, such service may answer in all actions which are substantially proceedings *in rem*."

In this case no personal or money liability was sought to be enforced against Hart, but only a judgment affecting the land. The filing of the suit for this purpose in the county where the land was situated was as much notice to every one that the land was in controversy as if the land had been sequestered or attached. The mere fact that the land had been seques- tered or attached could not possibly have given Hart any more notice than the filing of the suit.

Cooley on Constitutional Limitations, page 404.

If every one is presumed to be living on the land, or have an agent in the county where the same is situated, he is bound to take notice of what passes in the courts of justice affecting said land.

Brisco vs. *Brombaugh*, 1 Tex. Rep., 333.

The suit in Johnson County was brought for the purpose of recovering the land from all the defendants, and to quiet the title of plaintiffs, and the judgment rendered in that case was final as to all matters that were or might have been litigated therein, and there was no misjoinder of actions. The petition sets out that the defendant, E. J. Hart, sets up some pretended claim and title to the land, and, also, that the other defendants claim the same, and they pray that the title of plaintiffs in and to said premises, and every part thereof, may be confirmed and established as against said defendants, and each and every of them.

There was no misjoinder of actions in suit in Johnson County.

In Texas the system of the splitting of causes of action and multiplication of suits are discountenanced, and the rule against the multiplicity of suits, within reasonable limits, it is the cardinal principle as to the joinder of parties and causes of action.

Clegg vs. *Varnell*, 18 Tex., 294;
Pitts vs. *Ennis*, 1 Tex., 604:
Morris vs. *Ashley*, Dallam, 619.

Where the object of the suit is to establish a general right in the plaintiff against several persons unconnected and claiming several and distinct rights in the subject-matter of the suit, it is not multifarious.

Morris vs. *Ashley*, Dallam, 619;
Chevalier vs. *Rush*, Dallam, 571.

It was the duty of Hart to have pleaded his title in that case, and his failure to do so precludes him from bringing this suit.

Freeman on Judgments, secs. 272 and 309.

The object of the suit was to establish the general rights of the plaintiffs to the land against all the defendants.

The judgment or decree of a Court of Competent Jurisdiction is not only final as to the matters actually determined thereby, but also upon all matters properly involved in the case.

Teal vs. *Terrell*, 218 Tex., 491;
Russel vs. *Place*, 94 N. S. 606.

The record admitted by the court below did estop Hart from asserting his title to the land in this suit. If he had

title to the land he should have asserted it in the Johnson county case. The jury found in that case that there was no title to the land in favor of Hart recorded in Johnson county, Texas, as required by the laws of Texas. So far as the proof shows, he never paid any taxes on said land, nor attempted to exercise any acts of ownership over the same. And the deeds under which he claims—viz., the deeds from Thos. M. League to John Fitzgerald, of date 19th August, 1846, and from Fitzgerald to Hart, dated 5th of July, 1855—were not recorded until Dec'r 9, 1879. The conclusion is almost irresistible, that if Hart ever did really own the land, that he had either in some way released his interest to League, or abandoned his title to same. If he intended to claim said land, he should have pleaded his title to the same in the former suit, or he should have sought to obtain his relief in the case in Johnson county, either by writ of error, appeal, or bill of review, either of which remedies were open to him for two years after the rendition of the judgment. Having failed to avail himself of these remedies, he is now estopped from seeking to attack the said judgment in this collateral proceeding.

It is submitted that there is nothing in the proceeding in the Johnson County case to show that the plaintiffs in that case "took advantage of the forms of the law to publish notice to him in an obscure country newspaper, take judgment by default, and now claim by such a proceeding to have defeated a title which they were bound to uphold." On the contrary, it would seem that Hart, by his negligence and fault in failing to have his deeds recorded, and failing to prosecute his rights in the State courts, if he had any, to set aside and annul a judgment in strict conformity to the law of the State where rendered, and then by recording his deeds more than four years after judgment, seek

to recover this land by collaterally attacking a judgment of a State court rendered according to law, was seeking to take advantage of his own negligence and wrong.

We respectfully submit that the judgment should be affirmed.

A. S. LATHROP,
For Defendant in error.

110-157

IN THE

SUPREME COURT OF THE UNITED STATES.

E. J. HART
vs. } 958.
SANSOM, LEAGUE *et al.*

Reply Brief for Plaintiff in Error.

Mention is made in defendant's brief that the deed of Fitzgerald to Hart was not recorded in Johnson Co., until 1879.

As the controversy is solely between Hart and the defendants, who claim as heirs of the warrantor, this fact is of no consequence.

Defendants place their sole reliance in defence of the binding force of the judgment rendered in the State Court, on the ground that the proceeding as against Hart was *substantially* a proceeding in *rem*, and therefore service by publication was valid. For this proposition reference is made to *Pennoyer* vs. *Neff*.

We submit that there is nothing in that case to support the contention.

In the suit in the State Court, it was not pretended that Hart was in any privity with the other defendants, or that he was in possession of the land.

On the contrary, the allegation is, that Wilkenson, another of the defendants, was in possession and the proceeding as to him in all respects is an action of trespass to try title.

As far as Hart is concerned therefore the suit must be viewed as if it had been the sole defendant.

The single allegation as to him, is that "the defendant Hart sets up a pretended claim and title to the land," and that said pretended claim cast a cloud upon the title.

No specific relief is in fact asked against Hart, but the prayer is that "the cloud upon the title of the plaintiffs created by the several deeds (held by *other defendants*) be removed and that the said deeds be declared void and be cancelled, and that the title of the plaintiffs be established." p. 10

Assuming that the claim of Hart was included in the prayer it is manifest that the only relief which could have been granted against Hart was that which was afforded against the other defendants, who held specified deeds, to wit: that said deeds should be annulled and cancelled. p. 12.

A bill to remove a cloud upon the title in no wise partakes of the nature of a proceeding in *rem.* Instead of being a proceeding *against* the property it rests on the fact that the complainant has recovered the property, and its object is to prevent the defendant by injunction from casting a cloud on the title, or if the cloud is already cast, its object is to remove it.

The decree acts upon the party, and, as we have shown from the Texas decisions, the suit is maintainable wherever the defendant is found. It is not local in its character and therefore it need not be prosecuted where the process of the court can reach the *res.*

In *Hollingsworth* vs. *Barbour* it was sought to uphold a

decree founded on publication against a non-resident, because the suit was for the specific performance of an agreement to convey land. This court said:

> "The case under consideration is not properly a proceeding in *rem*; and a decree in chancery for the conveyance of land has never yet, within my knowledge, been held to come within the principle of a proceeding in *rem*, so as to dispense with the service of process on the party." (4 pet. 475.)

And in *Pennoyer* vs. *Neff* the court refer with approbation, to the decision in *Boswell* vs. *Otis*, 9 How., where it was held that in a suit to enforce a contract relating to land, service by publication was void as against a non-resident. (95 U. S, 724)

We submit that where it is sought in a court of the United States to deprive a non-resident citizen of rights by virtue of a judgment of a State court, rendered by default without actual notice or an opportunity to make his defense, such, judgment should be disregarded unless the case is *clearly* one where personal service was not necessary.

We submit that the proceeding in controversy was not such a case, and that the judgement should be reversed.

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